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IN THE

# Supreme Court of the United States

OCTOBER TERM 1939.

No. 240

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FRANK CARMINE NARDONE, NATHAN W. HOFFMAN, and ROBERT GOTTFRIED,

*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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## STATUTE INVOLVED.

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*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioners respectfully represent:

I. That on July 20th, 1939, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of conviction in a criminal cause against petitioners, which had been entered in the District Court of the United States for the Southern District of New York. But the Court in its opinion expressed doubt on the primary question involved in the appeal and, although it had previously and before the argument of the appeal, denied an application for the release of petitioners on bail, it unanimously directed in its opinion affirming the judgment that they be released on bail, upon condition that they file in this Court an application for a writ of certiorari within a specified time.

II. The judgment herein was entered upon a second trial of substantially the same issues. A judgment of conviction previously obtained on an indictment similar to the present

superseding indictment was reversed by this Court for error in the admission of evidence, obtained by unlawful interceptions of telephone and telegraph messages in violation of Section 605 of the Communications Act (48 Stat. 1103).

*Nardone v. United States,* 302 U. S. 379.

The principal basis of this petition is that the rule laid down by this Court in that decision was circumvented and in effect disregarded in the trial of the second cause, and that the technique, by which the circumvention was accomplished, violated the statute.

III. The crimes alleged in the present indictment were:

1. Unlawfully, wilfully and knowingly defrauding the revenue of the United States by smuggling, and clandestinely introducing into the United States, in violation of law, a quantity of alcohol, in violation of U. S. C. Title 19, Section 1593-a; and U. S. C. Title 18, Section 550.

2. Unlawfully, wilfully, knowingly and fraudulently receiving, concealing and facilitating the transportation of alcohol brought into the United States contrary to law in violation of U. S. C. Title 19, Section 1593-b; and U. S. C., Title 18, Section 550.

3. Conspiracy to commit divers offenses against the United States, to wit: to violate the provisions of the Tariff Act of 1930, more specifically, Title 19, Sections 1493-a and 1593-b.

Judgment of conviction was entered against petitioners and sentence was passed on March 23rd, 1939, as follows:

Petitioner Frank Carmine Nardone to a total of two years in the United States Penitentiary, concurrent sentence for that period being imposed, and a fine of $3,000.00.

Petitioner Nathan W. Hoffman to a total of two years in United States Penitentiary, concurrent sentence for that period being imposed, and a fine of $2,500.00.

Petitioner Robert Gottfried to a total of one year and a day in United States Penitentiary, concurrent sentence for that period being imposed.

Petitioners were immediately incarcerated and applications to the trial Court, the Circuit Court of Appeals and this Court for their release on bail pending the determination of their appeal were denied.

In this connection the remarks of the Circuit Court of Appeals in the opinion affirming the conviction herein may be noted:

> "When we denied bail originally, we had not had the chance to examine the record or to appreciate the doubts which have now appeared."

IV. The assignment of errors, filed below on behalf of petitioners, presented *inter alia* the following questions which were argued and decided in the Circuit Court of Appeals:

(a) Whether the trial Court erred in overruling the objection made on behalf of petitioners to the introduction of evidence, obtained by unlawful interceptions of telephone and telegraph messages, and in curtailing the inquiry, and denying a full inquiry into the admissibility of such evidence and rejecting an offer of proof as to its inadmissibility.

The offer of proof and the circumstances attending the trial Court's rulings, as well as the rulings themselves will be set forth in the accompanying brief for petitioners.

(b) Whether basic rules of evidence were disregarded in the admission of evidence.

(c) Whether, eliminating evidence improperly received there was sufficient evidence to present a question of fact for the jury.

## Questions Presented.

V. The following are the questions presented for review by this Court:

A. Telephone and telegraph messages were intercepted by agents of the Government in violation of Section 605 of the Communications Act prior to the first trial and the judgment of conviction was reversed by this Court, because the records of the interceptions were received in evidence.

These records were retained by the Government and were referred to and used by some of its agents at various times including apparently the period of preparation for both the first and the second trial.

It became apparent at the second trial during the examination of the first witness that the Government had availed itself and at the trial was availing itself of the information obtained by the unlawful interceptions. The Court's attention was called to the fact (Record, f. 122) but action was deferred until the witness had been fully examined. At the conclusion of his examination, counsel for petitioners moved that his testimony be stricken on the ground that this evidence had been obtained by unlawful interception of telephone and telegraph messages, by the process commonly known as wire-tapping, in violation of Section 605 of the Federal Communications Act, and that the existence of the witness, the fact that he was a witness to some of the transactions, and the relations between the defendants and of the witness with the defendants and other persons alleged to be co-operating with them were revealed by the unlawful interceptions. *The Court announced that this matter would be taken up later in the trial* (R., fols. 136-138).

Petitioners renewed their objection at the close of the second witness' testimony and made an offer of proof that the evidence of both witnesses represented the fruits of the "Wire tapping" (R. fols. 147-151). The offer was made quite pointed and specific in the ensuing colloquy between the Court and counsel (fols. 152-164). The motion was denied and an exception was taken.

The offer of proof and the motion to strike were repeated frequently throughout the trial with the same result and exceptions were duly taken (fols. 282, 413, 425, 454).

Finally at the close of the Government's case the Court consented to take up the matter and began an inquiry into the source of the evidence. It took the position that the inquiry presented a question that could not be ruled on until all of the Government's testimony was in (f. 796). A Government agent who had participated in the wire-tapping, was called as a witness by the defense. Counsel for the Government after a few questions, objected to the questions on the ground that the statute (Section 605 of the Communications Act) was not aimed at interceptions but only at the divulging of intercepted messages (fols. 799-800). The objection finds no support in the statute but it was sustained by the Court (f. 800).

*However, the inquiry proceeded with interruptions sufficiently to reveal that the witness, who was active in the case, did not know Nardone, Hoffman or Gottfried prior to the interception of the messages* (f. 805) *nor had he heard of Geiger, the Government's first witness* (f. 808), *and he knew nothing of any relations between Nardone and Geiger* (f. 809).

The Court interrupted the inquiry again (fol. 809), and counsel pointed out that they were building up the evidence and previously had no information of the Government's witnesses or what it would do in making its case (fols. 811-

812). The Court then reversed its previous position and stated that the inquiry should have been made at the beginning of the trial.

As already pointed out, petitioners through their counsel had made their objection when the first witness was on the stand but the Court itself had deferred the inquiry. After a long colloquy between the Court and counsel, the Court was furnished with a list of Government witnesses, the admissibility of whose evidence was challenged, and an offer was made to prove that their testimony had been unlawfully obtained (fol. 837). Reluctantly the Court permitted the interrupted inquiry to be again resumed. *It was then shown that the witness Kozac had listened over tapped wires to over six hundred and fifty (650) messages and had thereby learned among other things of the existence of Geiger (also known as "Jiggs") the Government's first witness, of his acquaintance with petitioners and his business associations with them* (fols. 838-839).

Defendants' Exhibit A, containing testimony of Martin, a Government agent, in a removal proceeding, was offered to prove that the Government's information came from the tapping of wires and was marked only for identification (fols. 861-862). Specific records of interceptions were offered as the basis for proof as to the source of the Government's evidence, but they were excluded (f. 865).

Defendants' Exhibit B, containing records of intereceptions and testimony relating to them, received at the first trial, was also marked for identification.

The inquiry was then abruptly halted by the Court and all objections and motions on behalf of petitioners were overruled (fols. 865-867).

Thereafter exception was taken on behalf of petitioners and motion was made to strike the testimony of eighteen (18) witnesses (fols. 901-902).

The Government was permitted for some reason to call a witness, a Government supervisor, apparently in rebuttal of the one witness, whom counsel for defense had been permitted to examine incompletely.

He attempted to show that the Government had some sources of information independent of the tapped wires. For present purposes his testimony is unimportant and may be disregarded, because it would be unfair to give the slightest consideration to an issue of fact thus created. Petitioners were prevented from presenting their evidence beyond the incomplete examination of one witness. The trial Court was unwilling either to hear witnesses or receive records bearing on the interceptions and stated:

> "If I am wrong the Circuit Court will order some unfortunate judge to listen to all of it" (f. 864).

The fundamental error was in limiting the inquiry as to the source of the evidence. Indeed, it may fairly be said that the trial Court denied any inquiry, although an adequate offer of proof was made and was repeated several times.

In its opinion, the Circuit Court of Appeals said on this point:

> "In substance the judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine as to any specific evidence they could point out. Evidence does not bear the ear-marks of its acquisition."

Furthermore, in this cause the trial Court brought in the question whether intrastate messages are under the ban of the statute, and whether it is encumbent upon defendants, objecting to evidence, to show that the messages intercepted were of an interstate character. Folios 802, *et seq.* This case is the subject of conflicting decisions in

the several circuits and is therefore urged as appropriate for consideration on this application and for review by this Court. It is urged also in this connection that even without this question, the question already posed is sufficient to require review by certiorari.

B. The rule as to the admission of acts and declarations of co-conspirators was stretched so as to admit hearsay evidence of a type rarely offered in court as proof of anything.

One Murphy, a seaman on a vessel alleged to be engaged in rum running, was permitted over objection to state that Mahe, wireless operator on the vessel, showed him a list on which the name of Nardone was included as one of the owners of the cargo (fols. 369-370). Mahe was not called as a witness. The list was not produced or accounted for. There was no proof as to the authorship of the list, nor as to the source of information, from which the unknown author obtained his alleged facts. There was no way in which the accuracy of the information could be tested. The theory of admissibility apparently rested on the assumption that because Murphy and Mahe were connected with the vessel, they must be assumed to be co-conspirators, and anything they might say, even though it be idle gossip on a cruise in the tropics, could be used against a person, whom they did not know, and with whom they had no dealing. There was no proof that they were co-conspirators, that they knew the conspiracy or its objects, and no ground for the presumption that they were guilty of a crime because they were on board the vessel on a certain day. Even conspiracy cases, more loosely tried than any other type of criminal case, seldom reveal such a dangerous departure from the hearsay rule. And the evidence went to the heart of the case, dealing directly with the question whether Nardone was in the conspiracy to smuggle liquor into the country.

C. If the improper and prejudicial evidence were excluded, the case could not have been submitted to the jury. It is urged therefore that as a matter of law, its submission was error.

We understand that the question of sufficiency of the evidence by itself will not ordinarily be considered by this Court on an application of this kind. But under the peculiar circumstances of this cause, and the close connection of this point with the others raised, it is urged as appropriate for consideration.

## Reasons for Granting the Writ.

VI. Your petitioners respectfully urge that, as shown above and as will be further urged in the brief accompanying this petition, the Circuit Court of Appeals has rendered a decision in conflict with applicable decisions of this Court, has affirmed a judgment obtained by circumventing and evading a rule laid down by this Court, and has decided an important question of Federal law in a manner which leaves that question and the rule of law in grave doubt, and that the questions presented are of wide interest and application and are likely to arise in a large number of cases in the various circuits.

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judg-

ment in this cause may be reversed, and that petitioners may have such other relief as this Court may deem appropriate.

Dated New York, N. Y., July 27th, 1939.

FRANK CARMINE NARDONE

By David V. Cahill

Attorney

NATHAN W. HOFFMAN.

By Wegman & Clemenko

Attorneys

ROBERT GOTTFRIED

By Louis Stalle

Attorney

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JESSE CLIMENKO, being duly sworn, deposes and says:

I am one of the attorneys for the petitioners herein. They are at present incarcerated. I have read the foregoing petition and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

JESSE CLIMENKO.

Sworn to before me this
27th day of July, 1939.

HARRIET COHEN
NOTARY PUBLIC, Kings County
Kings Co. Clk's No 731 Reg. No. 1405
Certificate filed in
New York Co. Clk's No. [illegible] Reg. No 10578
Commission expires March 30, 1941

IN THE

# Supreme Court of the United States

OCTOBER TERM 1939.

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN, and ROBERT GOTTFRIED,

*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### Statement.

Some of the essential facts have been stated in the petition. An adequate statement would unduly prolong the brief and is unnecessary for the reason that the primary question involved is purely one of law. The facts have been stated sufficiently to make intelligible the primary question of law. The opinion of the Circuit Court of Appeals is printed at the end of the Record.

### Jurisdiction.

The decision affirming the conviction was handed down on July 20, 1939.

The jurisdiction of this Court is invoked under Sections 237 and 240 (a) of the Judicial Code as amended, and under the Rules of Practice and Procedure of this Court.

## Statute Involved.

SECTION 605, TITLE 47, U. S. C. A., 48 STAT. 1103 (June 19th, 1934).

No person receiving or assisting in receiving or transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing offices of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information as so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information herein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

## POINT I.

**The Circuit Court of Appeals erred in deciding that the action of the Trial Court in denying petitioners an inquiry into the admissibility of evidence alleged to have been obtained by unlawful interception of telephone and telegraph messages, and in overruling objections to such evidence, did not constitute reversible error.**

The Circuit Court of Appeals in its opinion expressed doubt on this question and virtually suggested that petitioners apply to this Court for a writ of certiorari. That Court had previously denied bail to petitioners but stated that it would not have done so if it had had an opportunity to examine the record at the time of the application. It rectified the situation by unanimously directing that petitioners be released on bail, upon the sole condition that they should apply to this Court for a writ of certiorari within a specified time.

The language of the opinion demonstrates the seriousness of the questions and the grave doubts which the appellate Court entertained on the subject.

In reversing the judgment of conviction entered on the first trial of this cause, this Court held that Government agents as well as other persons were forbidden to intercept telephone and telegraph messages, and that the use of records of those messages as evidence against defendants was forbidden by Section 605 of the Federal Communications Act. In the trial which resulted in the present judgment, the records of intercepted messages were not directly used, but they had been retained by the Government and were made available to agents of the Government for investigating and preparing the case for the second trial (Record, fols. 896-898).

As already stated, counsel for the petitioners, while the first witness for the Government was on the stand, called the Court's attention to the question as to the source of his evidence, but action on this matter was deferred by the Court (fol. 122). At the conclusion of the first witness' examination, a motion was made to strike the testimony of the witness on the ground that his evidence had been obtained by unlawful interception of telephone and telegraph messages in violation of Section 605 of the Federal Communications Act. The Court announced that this matter would be taken up later in the trial (fols. 136-38).

Petitioners renewed their objection at the close of the second witness' testimony and frequently throughout the trial, and exceptions were taken on their behalf to the Court's failure to sustain their objections (fols. 147-51; 152-164; 282; 413; 425; 454). In addition to the objections made, formal offers of proof were made on behalf of petitioners. These were offers to prove that the evidence of various witnesses represented the fruits of wire tapping, that the existence of the witnesses, the fact that they were witnesses to some of the transactions of petitioners, and the relation between petitioners, and the relation of the witnesses with them and with other persons, had been revealed by the unlawful interception of telephone and telegraph messages. Ultimately these objections included the testimony of 18 witnesses (fol. 837). The Trial Court at first declared that it would take the matter up later in the trial and stated at one point during the trial that it could not pass on the question until all of the Government's evidence had been presented (fol. 796).

Finally, at the close of the Government's case, the Court permitted petitioners to begin the presentation of their evidence as to the inadmissibility of the Government's evidence. The first witness called in this inquiry was Kozac, a Government investigator. The inquiry was frequently

interrupted by the Court and counsel for the Government, and objections were sustained without clear reason for the rulings. The inquiry was brief, and having been punctuated by frequent interruption and arguments, it produced only a few facts. The examination of the witness was never completed because it was stopped by the Court.

The Circuit Court of Appeals in its opinion called attention to this fact:

> "In substance, the Judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine as to any specific evidence they could point out. Evidence does not bear the earmarks of its acquisition. One thing leads to another, and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure."

As stated by the Appellate Court, the inquiry was stopped by the Trial Court and was stopped in its early stages, so that it may justly be said there was no real inquiry into the admissibility of the evidence at all. The few facts disclosed by the limited questions which petitioners' counsel were permitted to ask revealed that there had been interceptions of 650 messages, and that the Government investigator who was testifying had thereby learned, among other things, of the existence of Geiger, the first witness, and of his dealings with petitioners (fols. 838-839). It was also revealed that prior to the interception, the witness did not know Nardone, Hoffman or Gottfried (fol. 805). The trial court had expressed reluctance to inquire into the admissibility of the evidence to which petitioners had objected, and thereafter begrudged the time necessary to a full inquiry. The Court's attitude is aptly illustrated by its remark, already quoted: "If I am wrong, the Circuit Court will order some unfortunate Judge to listen to all of it" (fol. 863). The fundamental error

was the unwillingness of the Court to ascertain whether the Government was evading in the second trial the rule laid down by this Court in the first case. As the matter now stands, there is no specific proof as to the manner in which the evidence presented was connected with the interceptions because the trial Court refused to receive such proof. But adequate offers of proof were made, and counsel for petitioners by these offers sought an opportunity to establish that the records of unlawfully intercepted messages, the admission of which had been condemned in the review of the first trial by this Court, had been retained and used in the preparation for the second trial, and that the information obtained by the unlawful interceptions formed a vital part of the Government's evidence in the second trial. This situation, *i. e.*, the failure of the trial Judge to permit the defendants an adequate opportunity to pursue their proposed discovery, gave rise to the doubt expressed by the Circuit Court in its opinion:

> *"From what we have said it is apparent that we think that the result here is doubtful."*

The Court below, in discussing this point, considered the effect of *Olmstead* v. *U. S.*, 277 U. S. 438. That case dealt solely with the question of whether the tapping of wires constituted an unlawful search under the Fourth Amendment. With all due respect to the Court below, it is urged that that question is not presented in the instant case. The primary question here is whether in the face of an express legislative ban on the interception of telephone and telegraph and similar messages, Government agents may nevertheless commit the crime of making such interception and use the information thus obtained as evidence in a criminal prosecution. The direct use of the interceptions themselves was declared unlawful and their use as evidence was found to constitute reversible error by this Court in the review of the first trial, *Nardone* v.

*U. S.*, 320 U. S. 379. In the present cause, it is sought to justify the indirect use of information obtained by the crime of wire tapping. The Court below thought that while in the case of an unlawful search or seizure offending against the Fourth Amendment, indirect as well as direct use of the evidence was prohibited, the law might be different in the case of a statute thus evaded. No reason for the distinction was given and none has been stated in any report or authority as far as we have been able to discover. It is urged that when Congress has declared a legislative policy with respect to evidence in a Federal trial and has forbidden the use of such evidence and the obtaining of evidence by certain means, the evasion of the ban by an indirect use of the evidence is error for precisely the same reason and in the same degree as if the Fourth Amendment or some other provision to the Constitution were violated (Article 6, Clause 2, of the Constitution of the United States). The reasoning in *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385, is clearly applicable in the present cause. There the Court was dealing with an unlawful seizure of papers which was held to have violated the Fourth Amendment. The papers were returned, but subsequently subpoenas to produce them were served and upon refusal to comply with the requirement of the subpoena, the owners of the papers were held in contempt. This Court there said:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit

by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915 B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915 C, 117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.*"

The logic of this statement is so clear in its application to the present situation, that elaboration upon it is unnecessary. Whether the law forbidding the acquisition and use of evidence in a certain manner be constitutional or ordinary legislation, it must be given effect, and the ban must be enforced by forbidding indirect as well as direct use of the information unlawfully obtained. Any other construction of Section 605 of the Federal Communications Act would reduce that statute to a mere form of words and would render it wholly ineffective to accomplish the purpose of Congress. It is urged that the reasoning of the *Silverthorne* case applies with equal force to the case at bar.

The Court below clearly doubted whether there was any distinction for this purpose between a constitutional provision and a legislative enactment and for that reason, desired a review of its decision by this Court.

The other points raised in the petition will not be discussed for the reason that reliance is placed mainly upon the sole point discussed in this brief, which the Court below suggested as appropriate for review.

## CONCLUSION.

**For the foregoing reasons, it is submitted that the serious question of law involved in this application is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.**

Dated: July 27, 1939.

Respectfully submitted,

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WEGMAN & CLIMENKO,
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